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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, Governor of the State of Alabama, *et al.*,
Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellees.

DOUGLAS T. SMITH, *et al.*,
Appellants,

v.

ISHMAEL JAFFREE, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF APPELLANTS DOUGLAS T. SMITH, ET AL.

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QUESTIONS PRESENTED

1. Does a moment of silence for individual silent "prayer or meditation" at the beginning of each school day in a public school classroom violate the Establishment Clause of the First Amendment as interpreted by its language, framers' intent, and history?

LIST OF ALL PARTIES

Undersigned counsel of record for Intervenors-Appellants certify that the following listed parties have an interest in the outcome of this case.

Ishmael Jaffree, Jamel Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree, named plaintiffs herein.

The Board of School Commissioners of Mobile County, Alabama; the Mobile County School Board Commissioners, Dan C. Alexander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth Drago and Dr. Robert Gilliard; Dr. Abe Hammons, Superintendent of the Board of Education of Mobile County; Mobile County School teachers, Julia Green, Charlene Boyd and Pixie Alexander, Mobile County School principals, Annie Bell Phillips, Betty Lee and Emma Reed.

Defendants-Intervenors: Bobby and Emily Cook, Thomas and Sibyll Bends, Linda Drashman, Mrs. Steve Cooper, Joanne DeBenedetto, Bill Flowers, Vonna Tuberville, Mrs. Ralph O. Kelly, Joel C. Kelley, Lamar Guyton, Mrs. Abbie D. Tamblyn, Joseph R. Thompson, Bill Norton, Wayne Ward, Faye R. Sellers, Billie Jack Mitchell, Sr., Glenn Wiley, Tom Jones, James M. Dodd, Jr., Judith R. Dodd, William Glen Byron, Bobby Schiferly, Mr. and Mrs. A. W. Lawrence, Eva Hendrix, Dorothy K. Chancy, Ed and Carol Lietz, Cindy Elliott, G. N. Burrows, Paul J. Reid, John V. Hendrix, Julia A. Reib, Mary Taylor, Rev. and Mrs. Joseph L. Garlington, R. Bruce Vandiver, Mrs. R. Bruce Vandiver, Mrs. R. F. Wallace, Mrs. Moya Wells, Mr. Larry Wells, Wanda Brooks, Jerry Brooks, Ronald Glaze, Myra Thompson, Betsy Miller, Barbara Williams, Jack Christensen, Donald E. Thompson, Sonja Thompson, Jacqueline R. Peters, Michael J. Puckett, A. Rodney Applegate, Jr., J. E. Solomon, Virginia Stonestreet, Marti Pulliam, Jimmy Jones, Marie Woodham, Susan S. Hahn, Tim McGraw, Charles R. Smith, Mr. and Mrs. Jefferson C. McGee, George E. Fisher, Chris Evans, Don Sissons, Georgia

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-812

GEORGE C. WALLACE, Governor of the State of Alabama, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

No. 83-929

DOUGLAS T. SMITH, *et al.*,

Appellants,

v.

ISHMAEL JAFFREE, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF APPELLANTS DOUGLAS T. SMITH, ET AL.

OPINIONS BELOW

The Preliminary Injunction of the United States District Court, Southern District of Alabama, was issued and reported on August 9, 1982, in *Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982) (reprinted in the Jurisdictional Statement Appendix of Governor George C. Wallace [hereinafter referred to as Wallace] No. 83-812 at JS 64d).[1] This Preliminary Injunction was later vacated by an Order of the court issued and

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[1] References to "JS ——" are to appropriate pages of the Appendix to the Jurisdictional Statement of Wallace No. 83-812.

reported on January 14, 1983, in *Jaffree v. James*, 554 F. Supp. 1130 (S.D. Ala. 1983). (JS 56d) The Memorandum Opinion was issued and reported on the same day in the companion case of *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983). (JS 1d) The two cases were consolidated upon appeal, and Wallace was substituted for Governor Fob James. The Opinion of the United States Court of Appeals for the Eleventh Circuit, affirming in part, reversing in part, and remanding with directions, was issued on May 12, 1983, in *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). (JS 1a) The per curiam decision of the court of appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc, with an accompanying dissent written by Judge Roney, was issued on August 15, 1983, in *Jaffree v. Wallace*, 713 F.2d 614 (11th Cir. 1983). (JS 1b) The district court then issued an order enforcing the order of the court of appeals and enjoining the statutes and activities there held to be unconstitutional, on October 14, 1983. (JS 62d)[2]

JURISDICTION

Jurisdiction of this Court, to review the final judgment of the court of appeals that held a state statute or an activity treated as a state statute unconstitutional, is conferred by 28 U.S.C. § 1254(2).

A Notice of Appeal by the Appellants Douglas T. Smith, et al. [hereinafter referred to as Smith] (the Defendant-Intervenors at the trial court) to the judgment of the court of appeals was filed on November 2, 1983 (reprinted in Appendix 3a to Jurisdictional Statement of Appellants Smith). Probable jurisdiction was noted by this Court on April 2, 1984, as to the constitutionality of a period of silence for meditation or voluntary prayer. ALA. CODE § 16-1-20.1 (1981).

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[2] References to the Appendix in this brief are designated by a number and the letter "a", such as "5a".

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to the Jurisdictional Statement of Appellants Smith contains in full the following provisions: article VI, clause 2 and the first and tenth amendments to the United States Constitution (at 1a); only the relevant portions of the fourteenth amendment of the United States Constitution (at 1a) and of the Northwest Ordinance of 1789 (at 2a); and ALA. CODE § 16-1-20.1 (1981) (at 2a).

STATEMENT OF THE CASE

Appellee, Ishmael Jaffree (hereinafter referred to as Jaffree), on behalf of his three minor children enrolled in the Mobile, Alabama public school system, brought this action against the Board of School Commissioners of Mobile County, Alabama, requesting a permanent injunction against (1) all activities designed to encourage a belief in religion and (2) all teaching from *all instructional materials* which furthers a belief in religion. (R. 8, 9)[3] Jaffree then amended his complaint to ask that ALA. CODE § 16-1-20.1 (1981), providing a one-minute period of silence at the beginning of the school day "for meditation or voluntary prayer", be declared unconstitutional. Governor Fob James was added as a named defendant. (R. 92-100)

The trial judge, Judge W. Brevard Hand, issued a preliminary injunction (JS 64d) against the enforcement of the statute. The court stated, however, that "[t]his Court will not by judicial fiat delineate what a teacher or student may do in regard to his personal religious benefits for these are matters of personal conscience."[4] (JS 75d)

Seventeen people (R. 252-57) were allowed to intervene as party defendants. (R. 704) Following a motion

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[3] "(R. ——)" will hereinafter designate the appropriate page of the Record on Appeal; "(T. ——)" will hereinafter designate the appropriate page of the Trial Transcript.

[4] *Jaffree v. James*, 544 F. Supp. at 733.

filed October 22, 1982, 607 additional teachers, parents and students were allowed to join the original seventeen and have since continued as Intervenors. (R. 424) Appellants Smith, through their counsel, actively participated in the November 1982 trial on the merits, by presenting five expert witnesses and three teachers, one parent, and one student as witnesses, as well as by cross-examination, oral arguments and the submission of briefs.

The district court on January 14, 1983, entered an order for want of jurisdiction, stating:

> This Courts' review of the relevant legislative history surrounding the adoption of both the first amendment and the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate . . . .[5]
>
> Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.[6]

The plaintiff appealed to the Eleventh Circuit Court of Appeals (R. 522), which reversed the district court's dismissal of the case, holding that the one-minute period of silence for meditation or prayer was a violation of the establishment clause.[7] The court further held that the establishment clause prohibited "any government involvement with religion" (JS 8a) and that "the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation,"

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[5] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128 (JS 48d-49d).

[6] *Jaffree v. James*, 554 F. Supp. 1130 (JS 56d).

[7] *Jaffree v. Wallace*, 705 F.2d at 1533-36. ALA. CODE § 16-1-20.1 (1981).

(JS 18a) implying that teachers may not discuss any religious matters in public school.[8]

A dissent by four judges on the court of appeals to the denial of rehearing, written by Judge Roney, argued that the statute which provides for a moment of silence for meditation or permissive prayer, is neutral and "facially and operationally constitutional." [9] (JS 4b)

SUMMARY OF ARGUMENT

This case provides the Court with a unique opportunity to affirm the clear language of the Constitution, the intent of the Founding Fathers, and history of the contemporaneous period regarding the constitutionality of a moment of silence for permissive prayer or meditation. The *language* of the establishment clause does not forbid a moment of silence, and, as this Court has recently ruled, does not "require complete separation of church and state . . . ." *Lynch v. Donnelly*, 104 S.Ct. 1355, 1359 (1984).

The *framers' manifest intent* was to allow in governmental institutions the widespread practice of individual silent prayer and meditation, which was not seen as the establishment of a national church. The *contemporaneous history* shows many forms of permissible oral prayer—which a fortiori justifies individual silent prayer or meditation. The Northwest Ordinance, for example, passed 58 days prior to the establishment clause, provided federal land for schools which were encouraged to teach religion and morality.[10] Grants of land to the Alabama territory were similarly restricted as to use.[11]

The record contains numerous historical documents and treaties introduced as evidence for the trial court to pass upon, as well as the testimony of expert witnesses on the

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[8] *Jaffree v. Wallace*, 705 F.2d at 1531 and 1536.

[9] *Jaffree v. Wallace*, 713 F.2d at 616.

[10] Northwest Ordinance, ch. 8, art. III, 1 Stat. 50, 52 (1789).

[11] Mississippi Territory Act, ch. 28, § 6, 1 Stat. 549, 550 (1798).

history of the Constitution. Much of this material is newly discovered and was not available to this Court when it ruled in *Everson v. Board of Education*, 330 U.S. 1 (1947), *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). The evidence was presented in an adversarial context, with opportunity for attorneys and the court to cross-examine experts and their sources of evidence.[12] Further historical material makes clear that the establishment clause was never applied to the states by the fourteenth amendment.

To forbid individual silent prayer or meditation would be the governmental "hostility" and certainly "callous indifference" to religion that the establishment clause forbids. *Lynch v. Donnelly*, 104 S.Ct. at 1359; *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952). The precedents of this Court for the first 160 years of our history until *Everson*, and the primary precedents of this Court since *Everson*, uniformly require that it overrule the court

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[12] The Opinion of the court below relied heavily on the recent scholarship of Professor Robert L. Cord of Northwestern University in R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982) (introduced into evidence as Defendant-Intervenors' Exhibit 14 at T. 571-72), copies of which have been lodged with the Office of the Clerk for the convenience of this Court and excerpted in the Appendix to this brief at 28a-43a) on the language, intent and history of the establishment clause of the first amendment, and on Professor Raoul Berger of Harvard Law School in GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) on the language, intent, and history of the fourteenth amendment, as well as the scholarly testimony of James McClellan, former professor at Emory University and former Chief Counsel to the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary. Professor McClellan's study *The Making and the Unmaking of the Establishment Clause* in A BLUEPRINT FOR JUDICIAL REFORM (1981) [hereinafter cited as McClellan, *Establishment Clause*] and the chapter *Christianity and the Common Law* from JOSEPH STORY AND THE AMERICAN CONSTITUTION (1971) [hereinafter cited as MCCLELLAN, JOSEPH STORY] were introduced into evidence as Defendant-Intervenors' Exhibits 12 (T. 571-72) and 13 (T. 571-72), respectively.

of appeals' decision below and other federal court decisions questioning the constitutionality of silent prayer or meditation.

ARGUMENT

A MOMENT FOR INDIVIDUAL SILENT PRAYER OR MEDITATION AT THE BEGINNING OF EACH SCHOOL DAY IN PUBLIC SCHOOL CLASSROOMS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

The Alabama statute before this Court does not mandate that any particular religious or non-religious activity be allowed, but merely allows a teacher to set aside time for the class to silently engage in individual prayer or meditation. The statute does not require either religious or non-religious content for the moment of silence. Meditation may be theistic or nontheistic, accommodating "all faiths and all forms of religious expression" [13] and philosophic belief.

This Court has uniformly rejected the extreme approach to the establishment clause of an absolute wall of total separation between church and state. As stated by the Court in *Lynch v. Donnelly*, 104 S.Ct. at 1362, the tripart test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) is not exclusive and not always relevant. In *Marsh v. Chambers*, 103 S.Ct. 3330 (1983) and, to some extent, in *Larson v. Valente*, 456 U.S. 228 (1982), this Court did not employ the tripart test but instead employed the historical test.[14]

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[13] *Lynch v. Donnelly*, 104 S.Ct. at 1361, citing *Zorach v. Clauson*, 343 U.S. 306. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded that there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 104 S.Ct. at 1362. As is evident in the subsequent sections, the drafters of the establishment clause believed that the teaching of religion and practice of prayer in public schools had a secular purpose—good government and the betterment of mankind.

[14] For the effects of these decisions on subsequent lower court rulings *see, e.g., Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y.

The historical test should be applied in this case to the moment of silence for permissive prayer or meditation in public schools, just as it was applied in *Marsh* to uphold the prayers offered by a state-paid chaplain to a state legislature. However, if the tripart test is applied, the primary effect and purpose of a moment of silence are constitutional under *Lynch* and *Marsh*, with no excessive entanglement.

A. The Establishment Clause Does Not Prohibit Individual Silent Prayer or Meditation in Public Schools, as Demonstrated by Its Judicial Construction, Intended Meaning, and Contemporaneous History.

This Court's construction of the establishment clause has consistently rejected the extreme approach of an absolute wall of total separation of church and state that would bar a moment for individual silent prayer or meditation. This Court recently has authorized alternatives to the tripart test, and has employed the historical test, which strongly supports the constitutionality of a moment of silence. The historical adoption of the Northwest Ordinance, by the same First Congress that adopted the establishment clause, and the historical permissibility of prayer in federal public schools and in other governmental institutions argue strongly for the constitutionality of a moment of silence. As discussed in Section B, *infra*, the language and intended meaning of the establishment clause similarly does not in any way prohibit a moment for individual silent prayer or meditation.

1. *Supreme Court Construction Rejecting the Extreme Approach of an Absolute Wall of Total Separation of Church and State.*

This Court, in its most recent pronouncement on the establishment clause, held:

> The concept of a "wall" of separation is a useful figure of speech probably deriving from views of

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1984) following *Marsh v. Chambers* in applying the historical test to the Army chaplaincy.

> Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is *not a wholly accurate description* of the practical aspects of the relationship that in fact exists between church and state.
>
> . . . "It has never been thought either possible or desirable to enforce a regime of total separation. . . ." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 93 S.Ct. 2955, 2958, 37 L. Ed. 2d 948 (1973). *Nor does the Constitution require complete separation of church and state*; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. *See e.g., Zorach v. Clauson*, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L. Ed. 954 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L. Ed. 649 (1948). . . .
>
> . . . .
>
> This history may help explain why the Court consistently has *declined to take a rigid, absolutist view* of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*." *Walz v. Tax Commission*, 397 U.S. 664, 671, 90 S.Ct. 1409, 1412, 25 L. Ed. 2d 697 (1970) (Emphasis added). In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Lynch v. Donnelly, 104 S.Ct. at 1359-1361 (emphasis added, footnotes omitted).[15]

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[15] The Court has often relied on its 1878 adoption of the phrase "wall of separation" in *Reynolds v. United States*, 98 U.S. 145, 163-65 (1878). The poor scholarship employed in that decision is evidenced by the fact that the Court (1) did not review the debates to find the intent of Congress and the ratifying state legis-

Similarly, this Court held that its establishment clause decisions "do not call for total separation of church and state," and that the necessary partial separation "far from being a 'wall,' is a blurred, indistinct, and variable barrier," in the very decision that laid down the tripart test. *Lemon v. Kurtzman*, 403 U.S. at 614, *quoted in Lynch v. Donnelly*, 104 S.Ct. at 1362. It warned that the "metaphor of a 'wall' or impassible barrier between Church and State, taken too literally, may mislead constitutional analysis. . . ." *Gillette v. United States*, 401 U.S. 437, 450 (1971). This Court noted that the "First amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . ." *Zorach v. Clauson*, 343 U.S. at 312, *quoted in Walz v. Tax Commission*, 397 U.S. at 669. Also, the Supreme Court recently sustained the constitutionality of spoken group prayer—not just a moment for permissive silent individual prayer or meditation—in *Marsh v. Chambers*, 103 S.Ct. 3330.

As a result, this Court has permitted a number of activities in public schools and in other governmental institutions that would contravene an extreme position of an absolute wall of total separation of church and state. Some examples were recounted in *Lynch v. Donnelly*:

> There is an unbroken history of official acknowledgment by all three branches of government of a role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively

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latures; (2) did not look to contemporaneous acts of Congress to find its intent; (3) relied on Madison's writing about and for another event, his *Memorial and Remonstrance*; and (4) looked to Jefferson's 1802 "wall of separation" letter, while noting that he was absent as minister to France during the drafting, debate and adoption of the first amendment. The irony of *Reynolds*, however, is that the Court correctly used the contemporaneous act method to find Virginia's legislative intent for its anti-polygamy statute, passed subsequent to its act establishing religious freedom. This failure to use the contemporaneous act approach for the first amendment as well has caused many of the Court's apparent inconsistencies in interpreting the establishment clause.

expressed than in Justice Douglas' opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly:

> "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson supra*, 343 U.S. at 313, 72 S.Ct., at 684.

See also *Abington School District v. Schempp*, 374 U.S. 203, 213, 83 S.Ct. 1560, 1566, 10 L. Ed. 2d 844 (1963).

Our history is replete with *official references to the value and invocation of Divine guidance* in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to *give thanks* for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago. Ch. 167, 16 Stat. 168 (1870). That holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance.

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. See J. Res. 5, 23 Stat. 516 (1885). Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.

Other examples of reference to our religious heritage are found in the statutorily prescribed *national*

> *motto* "In God We Trust," 36 U.S.C. § 186, which Congress and the President mandated for our currency, see 31 U.S.C. § 324, and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by thousands of public school children—and adults—every year.
>
> *Art galleries* supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. . . .
>
> There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. Congress has directed the President to proclaim a *National Day of Prayer* each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h. Our Presidents have repeatedly issued such Proclamations. Presidential Proclamations and messages have also issued to commemorate Jewish Heritage Week, Proclamation No. 4844, 46 Fed. Reg. 25,077 (1981), and the Jewish High Holy Days, 17 Weekly Comp. Pres. Doc. 1058 (Sept. 27, 1981). One cannot look at even this brief resume without finding that our history is pervaded by expressions of religious beliefs such as are found in *Zorach*, *supra*. Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." *Id.*, 343 U.S. at 314, 72 S.Ct., at 684.

Lynch v. Donnelly, 104 S.Ct. at 1360-61 (emphasis added, footnotes omitted).

A moment for individual silent prayer or meditation was sustained by a three-judge district court panel in *Gaines v. Anderson*, 421 F.Supp. 337 (D. Mass. 1976), applying this Court's nonabsolute approach to the establishment clause. (Several other courts have struck down

similar statutes, often employing an erroneous absolute approach to the establishment clause.[16]) The court in *Gaines* held:

> The requirements of the First Amendment do not implicate hostility to religion or indifference toward religious groups; they do not import a preference for those who believe in no religion, or demand primary devotion to the secular.
>
> The 1973 amendment is framed in the disjunctive, and the statute as amended permits meditation or prayer without mandating the one or the other. Thus, the effect of the amended statute is to accommodate students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters.

Id. at 343. That decision embodies the proper constitutional analysis for this case.

2. *Supreme Court Authorization of Alternatives to the Tripart Test and Use of the Historical Test.*

This Court has explicitly noted that the tripart test (laid down in *Lemon*) is not the exclusive test to be used in establishment clause cases. It held in *Lynch*:

> But, we have repeatedly emphasized our *unwillingness to be confined to any single test or criterion in this sensitive area. See e.g. Tilton v. Richardson*, 403 U.S. 672, 677-678 (1971); *Nyquist, supra*, 413 U.S., at 773. In two cases, the Court did *not even apply the Lemon "test."* We did not, for example, consider that analysis relevant in *Marsh, supra*. Nor did we find *Lemon* useful in *Larson v. Valente*, 456 U.S. 228 (1982), where there was substantial evidence of overt discrimination against a particular church.

Lynch v. Donnelly, 104 S.Ct. at 1362 (emphasis added). This Court has made similar statements in *Mueller v.*

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[16] *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983); *May v. Copperman*, 572 F. Supp. 1561 (D.N.J. 1983); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982).

Allen, 103 S. Ct. 3062, 3066 (1983), and *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

The Supreme Court recently used the historical test instead of the tripart test in *Marsh v. Chambers*:

> The Court's interpretation of the Establishment Clause has comported with what history reveals was the *contemporaneous understanding* of its guarantees. . . . In the very week that Congress approved the Establishment Clause as a part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate. In *Marsh v. Chambers*, —— U.S. ——, 103 S.Ct. 3330, 77 L. Ed. 2d 1019 (1983), we noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official Legislative Chaplains to give opening prayers at sessions of the state legislature. *Id.*, at ——, 103 S.Ct., at 3336.
>
> The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the *greatest weight in the interpretation* of that fundamental instrument," *Myers v. United States*, 272 U.S. 52, 174-75, 47 S.Ct. 21, 45, 71 L.Ed. 160 (1926).
>
> . . . .
>
> . . . We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as *illuminated by history*." *Walz v. Tax Commission*, 397 U.S. 664, 671, 90 S.Ct. 1409, 1412, 25 L. Ed. 2d 697 (1970).

Lynch v. Donnelly, 104 S.Ct. at 1359, 1361 (emphasis added). That historical test leads inexorably to the constitutionality of a moment for individual silent prayer or meditation, as the remainder of this brief argues.

3. *Contemporaneous History of Passage of the Northwest Ordinance by the First Congress.*

The Northwest Ordinance, enacted by the very Congress that adopted the first amendment, provides:

> *Religion, morality,* and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Ch. 8, art. 3, 1 Stat. 50, 52 (Aug. 7, 1789) (emphasis added). (Appendix to the Jurisdictional Statement of Appellants Smith at 2a.)

Justice Douglas, concurring in *Engel v. Vitale*, 370 U.S. at 443, noted that "[r]eligion was *once* deemed to be a function of the public school system" (quoting the Northwest Ordinance set out above).[17] However, the Supreme Court has never examined Congress' contemporaneous passage of the Ordinance to see what light it sheds on the meaning of the establishment clause.

On July 10, 1787, a committee consisting of James Madison of Virginia, Nathan Dane of Massachusetts, and three other members of the Continental Congress reported a resolution authorizing a contract for surveying and sale of federal lands northwest of the Ohio River.[18] Lot No. 16 in each Township was given perpetually for the purpose of "*public education*" (as set out in the Ordinance of May 20, 1785), and Lot No. 29 in each Township was given perpetually for "the *purposes of religion.*" [19]

On July 13, 1787, Congress specified the use to be made of the land set aside for public education. It passed the Northwest Ordinance which provided: "*Religion, Morality*

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[17] (Emphasis added). The Ordinance was also referred to in *Jones v. Opelika*, 316 U.S. 584, 622 (1942); *Meyer v. Neb.*, 262 U.S. 390, 400 (1922); and *Andrus v. Utah*, 446 U.S. 500, 522 n. 3 (1980) (Powell, J., dissenting).

[18] 32 J. OF THE CONTINENTAL CONG. 311 (1787).

[19] *Id.* at 312 (emphasis added); Ordinance of May 20, 1785, art. 3, 28 *id.* at 375, 378, dealing with grants of land to public education. *See Andrus v. Utah*, 446 U.S. at 522-23.

and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education *shall forever be encouraged.*" [20]

The Ordinance was drafted by Nathan Dane of Massachusetts, who wanted Eastern politics to be extended to the new territories and especially to Ohio, since many of its settlers had emigrated there from New England.[21] The Ordinance is a deliberate rejection of the philosophy of Thomas Jefferson, who had led the fight against tax support of religious teachers in 1785.[22]

The Ordinance follows the language of the Massachusetts and New Hampshire constitutions of 1780 and 1784, respectively. These required the local towns to appropriate tax money for the "support and maintenance of public Protestant teachers of piety, religion and morality" who would provide "public instruction in morality and religion." [23]

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[20] Northwest Ordinance, art. 3, 32 J. OF THE CONTINENTAL CONG. 334, 340 (1787) (emphasis added).

[21] Letter from Nathan Dane to Rufus King (Aug. 12, 1787), *reprinted in* 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 636 (E. Burnett ed. 1936).

[22] F. PHILBRICK, THE LAWS OF ILLINOIS TERRITORY 1809-1818 cccxxiv-cccxxv (1950).

[23] Massachusetts, the first colony to pass a public school law in 1647 requiring each township to appoint an individual to teach children the "knowledge of the Scriptures," provided by its constitution of 1780:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon *piety, religion and morality*; and as these cannot be generally diffused through a community but by the institution of public worship of God, and of *public instructions in piety*, . . . the legislature shall from time to time *authorize and require*, the several towns . . . to make suitable provision at their own expense, for the institution of public worship of God, and for the *support and maintenance of public protestant teachers of piety, religion, and morality* . . . .

MASS. CONST. of 1780, Pt. I, art. III (emphasis added).

The New Hampshire constitution of 1784 also required "*public instruction in morality and religion*" and empowered "the legis-

When the First Congress assembled, Rep. James Madison, on June 8, 1789, reworked the proposed constitutional amendments from the states and submitted his version of the establishment and free exercise clauses to Congress for its consideration. His proposal stated: "nor shall *any national religion* be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." [24]

On July 13, 1789, the House constituted itself a committee of the whole to debate the disposition on lands in the Northwest Territory.[25] In the meantime (on July 21, 1789), after sitting idle for a month and a half, Madison's proposals for constitutional amendments, along with those of the states, were submitted to a select committee of which he was a member.[26] The same day the Northwest Ordinance had its first reading in the Senate.[27] A week later (on July 28, 1789), the select committee submitted the following version of the establishment clause to the

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lature to authorize . . . the several towns . . . to make adequate provision at their own expense for the *support and maintenance of public protestant teachers of piety, religion and morality.*" N.H. CONST. of 1784, art. VI (emphasis added). The rationale for this was that "morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government . . . ." *Id.*

Georgia, which had established the Episcopal Church in 1784, also recognized the importance of religion in education, granting 20,000 acres in each county for a collegiate seminary of learning for this reason: "And whereas the encouragement of *religion* and learning is an object of great importance to any community, and must tend to the prosperity, happiness, and advantage of the same . . ." Act of Feb. 25, 1784, WATKINS DIGEST 293 (1800) (emphasis added).

[24] 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1789) (emphasis added).

[25] *Id.* at 646 (J. Gales ed. 1834).

[26] *Id.* at 660, 665 (J. Gales ed. 1789).

[27] *Id.* at 52 (July 21, 1789) (J. Gales ed. 1834).

House: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." [28]

Then on August 7, 1789, Congress re-enacted the Northwest Ordinance, which provided in Articles I and III:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his *mode of worship* or religious sentiments in the said territory.
>
> . . . .
>
> *Religion, morality,* and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education *shall forever be encouraged.*[29]

The fact that Congress re-enacted the Northwest Ordinance in 1789, 58 days prior to its adopting the establishment clause in final form, indicates that Congress gave its tacit approval to Nathan Dane's plan to extend governmental support of religious teaching in public schools in the Northwest Territories, and that the First Congress did not view that as the establishment of a religion.[30] (T. 548) Moreover, Justice Douglas' statement in *Engel* about the religious function of the public school system is correct, a function which in 1789 was not seen as a violation of the establishment clause. *Engel v. Vitale*, 370 U.S. at 443.

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[28] *Id.* (J. Gales ed. 1789) at 729. *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSE 123-42 (1964) [hereinafter cited as ANTIEAU, DOWNEY & ROBERTS], referred to favorably by Chief Justice Burger in *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 668 & 675 n. 3 (1970), for a detailed account of the debates and related newspaper accounts and letters.

[29] Northwest Ordinance, ch. 8, arts. I & III, 1 Stat. 50, 52 (1789) (emphasis added).

[30] The Ordinance also contradicts Justice Douglas' belief in *McGowan v. Md.*, 366 U.S. 420, 563 (1961) (dissenting opinion) that the establishment clause requires that "if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government."

According to Chief Justice Burger in *Marsh v. Chambers*, "historical evidence sheds light not only on what the draftsmen *intended* the Establishment Clause to mean, but also on how they thought that Clause applied to the *practice authorized* by the First Congress—their actions reveal their intent." 103 S.Ct. at 3334 (emphasis added).[31]

This legislative history clearly demonstrates that the First Congress saw no conflict between the establishment clause and encouragement that religion be taught and prayers be given in the public schools in the Northwest Territory created by grants of federal land. Nor did it believe that a child would be molested in his mode of worship or religious sentiments (Article I of the Ordinance) if he were compelled to study religion in school. Instead, Congress believed that religion and schools in which religion and morality were taught were necessary to good government and the happiness of mankind. President Washington shared this belief.[32] For the men who drafted the first amendment, advancing religion and religious teaching fulfilled a vital secular purpose, establishment of good government.[33]

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[31] *Accord, Wis. v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); *Boyd v. United States*, 116 U.S. 616, 623 (1886); *see also United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2582 (1983); *United States v. Ramsey*, 431 U.S. 606, 616-17 (1977); *Walz v. Tax Comm'n.*, 397 U.S. at 686 (Brennan, J., concurring); *Frank v. Md.*, 359 U.S. 360, 370 (1959), *reh'g denied*, 360 U.S. 914 (1959); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); *Myers v. United States*, 272 U.S. at 174-75, quoted with approval in *Lynch v. Donnelly*, 104 S.Ct. at 1359; *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

[32] *See* testimony of James McClellan (T. 548). President Washington in his Farewell Address of 1796 expressed the same conviction: "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." 5 W. IRVING, LIFE OF GEORGE WASHINGTON 343 (1860).

[33] The Northwest Ordinance shows that religious teaching may fulfill a secular end without violation of the establishment clause. As this Court held in *Lynch v. Donnelly*: "The Court has invalidated legislation or governmental action on the ground that a

4. *Contemporaneous History of Prayer in Federal Public Schools.*

When the First Congress encouraged the teaching of religion in the schools of the Northwest Territory, it intended and fully understood that prayer and Bible reading would be practiced in these schools, for this was the almost universal practice in the early constitutional period.[34] Since the Ordinance was patterned after the Massachusetts and New Hampshire constitutions, the practice of these states is especially relevant.[35]

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secular purpose was lacking, but *only* when it has concluded that there was *no question* that the statute or activity was motivated *wholly* by religious consideration." 104 S.Ct. at 1362 (emphasis added).

[34] Walter H. Small cites numerous regulations from various New England communities requiring headmasters to begin and even end the school day with prayer. W. SMALL, EARLY NEW ENGLAND SCHOOLS 301-03 (1969). *See* letters and reports collected under the topic *Schools As They Were Sixty Years Ago* in the AMERICAN JOURNAL OF EDUCATION concerning Connecticut, which had morning prayers and Bible study with the Bible as the only reading book until 1793: THE AMERICAN LEGACY OF LEARNING 161-62 (J. Best & R. Sidewell eds. 1967); 13 AM. J. EDUC. 123, 129-32 (1863); 16 *id.* at 137 (1866); 26 *id.* at 225 (1876). Delaware school opened by prayer and singing a hymn: 17 AM. J. EDUC. 187-88 (1867). Rhode Island students daily recited the Lord's Prayer and Ten Commandments: 27 *id.* at 707, 711-12 (1877).

[35] According to excerpts from the Massachusetts Common School Journal, "the Bible was the only reading book, Dilworth's Spelling Book was used, and the New England Primer." This Primer contained the Lord's Prayer, the Ten Commandments, books of the Old and New Testaments, and the Shorter Catechism. 12 MASS. COMMON SCHOOL J. 311-12, quoted in 14 AM. J. EDUC. 746 (1863). In 1789, before the establishment clause was adopted by Congress, the Massachusetts legislature required all common school teachers to be certified by a minister or ministers of the community in which they were to teach that each was morally qualified for the job. Act of June 25, 1789, ch. 19, 1789 Mass. Acts 416, 418. For a study of the content and broad influence of the New England Primer and use of the Bible as a leading textbook, *see* S. COHEN, A HISTORY OF COLONIAL EDUCATION 1607-1776, 60-63, 141 (1974) and 30 AM. J. EDUC. 371 (1880).

In New Hampshire the school day began and often ended with prayer and reading from the Bible, which, with the Psalter and

Anson Phelps Stokes, whose treatise and exhaustive research is highly respected on the subject of religion in American public and private schools, concludes that the fathers of the republic were accustomed "to the teaching of religion in virtually all schools." [36] The practice applied equally to the federal territories, the states, and Washington, D.C., as noted by contemporaneous acts of early Congresses.

When Congress created the Mississippi Territory in 1798, from which Alabama was later formed, it encouraged the teaching of religion and morality in its schools by providing that the people of the territory "shall be entitled to and enjoy all and singular the rights, privileges and advantages granted to the people of the territory of the United States, northwest of the river Ohio," in the ordinance of July 13, 1787.[37] This applied the "religion" in public schools' language of the Northwest Ordinance to the Mississippi Territory. Four years later Congress reserved a section in each township for "the support of schools." [38]

When Alabama was admitted into the Union in 1819, article 6 of its constitution required that "the general assembly . . . take measures to preserve from unnecessary waste or damage such lands as are, or hereafter may be, granted by the United States for the use of schools within each township in this State, and apply the funds which may be raised from such lands in *strict conformity to the object of such grant.*" [39] The Alabama School Code

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New Testament, were the only reading books until the time of the Revolution. *See, e.g.*, W. SMALL, *supra* note 34, at 300-04; W. BURTON, THE DISTRICT SCHOOL AS IT WAS 55 (C. Johnson ed. 1928).

[36] 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 48 (1950).

[37] Act of Apr. 7, 1798, ch. 28, § 6, 1 Stat. 549, 550.

[38] Act of Mar. 3, 1803, ch. 27 §§ 11 & 12, 2 Stat. 229, 233-34; Act of Mar. 3, 1817, ch. 62, § 3, 3 Stat. 375 (dealing with survey).

[39] ALA. CONST. of 1819, art. VI (emphasis added).

of 1927 refers to article III of the Northwest Ordinance as the "parent of the educational laws of the several states and of the United States of America" and states that "religion, morality, and knowledge [are] necessary" for good government.[40]

If this Court refuses to permit Alabama school students and teachers to have a moment of individual silent prayer or meditation, the State of Alabama would be unable to carry out the very purpose of the grant of Section 16 lands as specified by the First and Fifth Congresses. Moreover, because the lands were granted by the federal government with this provision, they theoretically might now be subject to being taken back by the federal government if the state can no longer carry out the purpose for which they were granted.

Both Ohio and Mississippi also received federal school land in return for their willingness to teach religion and morality in schools financed by these lands, and Ohio even agreed with the First Congress that such a provision as to use of school lands was not a violation of the establishment of religion under its state constitution.[41]

The federal public schools in Washington, D.C. provide another strong example. When the first school district

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[40] ALABAMA SCHOOL CODE 7 (1927). North Carolina adopted the Northwest Ordinance verbatim under article IX, § 1 of its 1868 constitution. *See* N.C. CONST. of 1868, art. IX, § 1.

[41] In the same section of the 1802 constitution that protects Ohio's citizens against the establishment of religion and in their rights of conscience, Ohio's Constitutional Convention (and subsequently Congress by its admission of Ohio into the Union) approved this clause: "But religion, morality, and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience." OHIO CONST. of 1802, art. VIII, § 3. Also, Mississippi, in receiving federal school lands, provided in § 14 of the seventh article of its 1817 constitution: "Religion, morality, and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools, and the means of education, shall forever be encouraged in this State."

was organized in Washington, D.C. in 1820, the Bible and the Watts Hymnbook were perhaps the only textbooks. Thomas Jefferson was the president of the school board. His approval of this curriculum is significant since the school was operated on federal land under congressional supervision.[42]

Congressional grants for evangelistic activities also provide important contemporaneous history. Early Congresses felt it their Christian duty to civilize the Indians in the federal territories by financially assisting the spread of the gospel. (T. 565) President Washington proclaimed a treaty on January 21, 1795, with the Oneida, Tuscorora, and Stockbridge Indians by which the United States paid "one thousand dollars, to be applied in building a convenient church at Oneida," New York, in place of the one which the British had burned in the Revolutionary War.[43]

Under Presidents Washington, Adams and Jefferson, Congress granted twelve thousand acres and extended the grant on five occasions to the Moravians or "*society of the United Brethren, for propagating the gospel among the heathen*" or Indians.[44] None of the three Presidents

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[42] J. WILSON, 1 PUBLIC SCHOOLS OF WASHINGTON 4-6 (Records of the Columbia Historical Society of 1897). Jefferson, as author of the much quoted "wall of separation" phrase, apparently saw no conflict between this federal public school practice and the establishment clause. However, Jefferson's views are really not relevant to the meaning of the establishment clause, because he did not participate in the first amendment debates, and was instead in Europe as minister of France from 1784 to November 1789.

[43] Treaty of Dec. 2, 1794, art. 4, 7 Stat. 47-48.

[44] Act of June 1, 1796, ch. 46, 1 Stat. 490-91 (4th Cong.) (emphasis added); re-enacted Act of Mar. 2, 1799, ch. 29, 1 Stat. 724 (6th Cong.); Act of Mar. 1, 1800, ch. 13, 2 Stat. 14-16 (6th Cong.); Act of Apr. 26, 1802, ch. 30, 2 Stat. 155 (7th Cong); Act of Mar. 3, 1803, ch. 30, 2 Stat. 236-37 (7th Cong.); and Act of Mar. 19, 1804, ch. 26, 2 Stat. 271-72 (8th Cong.), quoted in R. CORD, *supra* note 12, at 42-46, 62 & 263-70. Land was originally set aside by the Continental Congress for propagating the gospel among the heathen by Ordinance of May 20, 1785, 28 J. OF THE CONTI-

vetoed these six acts, indicating that they did not find them to be a violation of the establishment clause. (42a)

On October 31, 1803, Jefferson asked the Senate to give consent to a treaty with the Kaskaskia Indians that contained the following clause (T. 540):

> And whereas, *The greater part of the said tribe have been baptized and received into the Catholic church* to which they are much attached, the *United States will give annually for seven years one hundred dollars towards the support of a priest of that religion*, who will engage to perform for the said tribe the duties of his office and also to *instruct* as many of their *children* as possible in the rudiments of literature. And *the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.*[45]

Professor Cord cites page after page of early congressional enactments that provided federal land or appropriated federal funds to establish and fund Indian schools to the Moravians, the Missionary Society of New York, the Hamilton Baptist Missionary Society of New York, the American Board of Commissioners for Foreign Missions, the Baptist Board for Foreign Missions, the Cumberland Missionary Society, the United Foreign Mission Society of New York and the Foreign Mission Society of the Synod of South Carolina.[46]

NENTAL CONG. 375-81; Ordinance of July 23, 1787, 33 *id.* 399-401; Ordinance of July 27, 1787, *id.* 429-30; and Ordinance of Sept. 3, 1788, 34 *id.* 485-86. James Madison sat on the committee proposing this grant of land for the later ordinance.

[45] Treaty with the Kaskaskia Indians of Oct. 31, 1803, No. 104, 7 Stat. 78-79 (8th Cong.) (emphasis added), quoted in R. CORD, *supra* note 12, at 38-39, 261-63 (37a).

[46] *See* R. CORD *supra* note 12, at 63-73. In granting government land for religious purposes, Congress was simply following the practice of the states. Nine of the original thirteen states supported the teaching of religion in public or private schools with tax money or land. In addition to Massachusetts, New Hampshire, and Georgia (noted earlier, *supra* note 23), Rhode Island, Connecticut, New York, Pennsylavnia, South Carolina and North Carolina granted

These contemporaneous acts of the early Congresses indicate that prayer and the teaching of religion in schools under federal control were seen as fulfilling a valid national purpose, the moral and spiritual preparation of Americans to take a useful role in our society. Especially the Indians, who had not previously experienced the benefits of a Christian civilization, would be better citizens by their receiving the gospel, and Congress singled out specific denominational groups to propagate it. However, since no national church was being established in doing so, neither Congress nor the courts found these acts offensive to the first amendment. Applying the historical test to the establishment clause, a state may constitutionally allow a period for silent individual prayer or meditation.

5. *Contemporaneous History of Prayer in Other Governmental Institutions.*

The day after the first amendment was approved in the House in its final form, Federalist Elias Boudinot of New Jersey asked that "all the citizens of the United States [be offered an opportunity] of joining, with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured upon them." By resolution, he requested that the President "recommend to the people of the United States a day of public thanksgiving and prayers."

However, Mr. Boudinot went further, even suggesting to the people the form of the prayer, "to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of

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state land for the support of religious schools. *See, e.g.*, II STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AT THE END OF THE CENTURY: A HISTORY 260-326 (1902); 27 AM. J. EDUC. 712 (1877); VIII CONN. STATE RECORDS 100 (1795); Act of Apr. 9, 1795, ch. 75, N.Y. Laws 18th Sess. 50-51; ch. 2557, 1791-1793 Pa. Laws 71-73; Act of Dec. 21, 1799, S.C. Stat. 357; *see also* ANTIEAU, DOWNEY & ROBERTS, *supra* note 28, at 62-72, 167-74.

government for their safety and happiness." [47] Although the resolution does not specify if the prayer should be verbal or silent, verbal prayer is implied by calling for public prayer, which was customarily oral in the eighteenth century.

Anti-Federalist Aldanus Burke of South Carolina immediately objected to "this mimicking of European customs, where they made a mere mockery of thanksgivings." [48] Thomas Tucker, also of South Carolina, but a Federalist, objected to the resolution because it was "a religious matter, and, as such, proscribed to [Congress]," apparently referring to the establishment clause passed the day before.[49]

Roger Sherman, a Connecticut Federalist, perhaps reflecting the position of the established Congregational Church of his state, found precedent for such days of thanksgiving in Scripture as at the time Solomon built the temple and "worthy of Christian imitation on the present occasion." [50] Mr. Boudinot quoted further precedents from the practice of the Continental Congress. The motion carried and President Washington on October 3, 1789, issued the Proclamation.[51]

As Chief Justice Burger points out in *Marsh v. Chambers*, 103 S. Ct. at 3335, the evidence of opposition to and subsequent approval of a resolution "infuses [the force of the historical argument] with power by demon-

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[47] 1 ANNALS OF CONG. 914 (J. Gales ed. 1789). *See* R. CORD, *supra* note 12, at 27-29.

[48] *Id.*

[49] *Id.* at 915. Both men had voted against the amendment the previous day.

[50] *Id.*

[51] *Id.* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 64 (Richardson ed. 1901). President Washington issued a subsequent proclamation on January 1, 1795. *Id.* at 179-80. John Adams issued two and James Madison four during their terms as president. *Id.* at 268-70, 284-86, 513, 532-33, 558 & 560-61. See R. CORD, *supra* note 12, at 51-53, 251-60.

strating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society."

Since the resolution was directed toward all the people of the United States, both adults and children, apparently teachers and students were to participate. As with the Northwest Ordinance, there is no evidence that Congress sought to protect children from being compelled to pray. Instead, there is evidence that Congress intended to include them without any fear that it was establishing a religion by doing so.

Prayers were offered in the Congress, in the courts, and after the first inaugural ceremony at St. Paul's Chapel led by the congressional chaplain.[52] Also, the First Congress authorized the President "by and with the advice and consent of the Senate" to appoint a chaplain for the "military Establishment of the United States."[53] Of great significance is Jefferson's Act of April 10, 1806, which "earnestly recommended" that army officers and enlisted men attend Divine worship services. Irreverent behavior by officers at Divine worship services was to be punished by court marshal with Presidential reprimand. (T. 541)[54]

After a comprehensive 302-page examination of the debates and acts of Congress and the individual states,

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[52] See *Marsh v. Chambers*, 103 S.Ct. 3330, 3333-34 (1983); *Abington School Dist. v. Schempp*, 374 U.S. 203, 213 & 309-10 (1963) (Brennan, J. concurring); *Engel v. Vitale*, 370 U.S. 421, 446-50 (1962) (Stewart, J., dissenting); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 253-54 (1948) (Reed, J., dissenting); and *Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y. 1984), holding that the Army chaplaincy does not violate the establishment clause, but is an effort to allow all soldiers to worship as they choose without coercion.

[53] Act of Mar. 3, 1791, ch. 28, §§ 1, 5, 1 Stat. 222-23. The compensation for the chaplain was to be "fifty dollars per month, including pay, rations and forage." *Id.* § 6.

[54] Act of Apr. 10, 1806, ch. 20, art. 2, 2 Stat. 359-60 (9th Cong.).

Professor Cord concludes, as has this Court, that Congress intended only to prevent the establishment of a national church. He adds: "[n]or does any substantial evidence suggest that nondiscrimiantory or indirect aid to religion or to religious institutions was to come under the ban of the First Amendment."[55] Alabama does not establish any national religion by the challenged statutes; instead, its allowing permissive silent prayer or meditation "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. at 314.

B. The Establishment Clause Prohibits Only the Establishment of a National Church, as Shown by its Language and Intended Meaning.

The Court declared in *Lynch v. Donnelly*, 104 S.Ct. at 1361, that "[t]he real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government," quoting Justice Joseph Story.[56] Many constitutional scholars have reached the same conclusion, that the establishment clause forbids only the creation of a national established church, such as is indicated by former Justice Joseph Story, Professor Robert L. Cord of Northeastern University, the late Professor Mark DeWolf Howe of Harvard, Dr. James McClellan, formerly of Emory University, Professor John Baker of Louisiana State University Law School, Professor Wilbur Katz of University of Chicago Law School, Professor Peter Kauper of University of Michigan Law School, Professor Thomas Cooley of University of Michi-

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[55] R. CORD, *supra* note 12, at 50. *See Lynch v. Donnelly*, 104 S.Ct. at 1361.

[56] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871, at 728 (1833) [hereinafter cited as STORY'S COMMENTARIES], also quoted by Chief Justice Warren in *McGowan v. Maryland*, 366 U.S. 420, [illegible] (1961). *Accord, McCollum v. Bd. of Educ.*, 333 U.S. at 244 (Reed, J., dissenting). Joseph Story was a leading Unitarian of his time who served on the Supreme Court from 1811 to 1845 and as professor of law at Harvard Law School.

gan, Professor Edward Corwin of Princeton University, and Professor Walter Berns of University of Toronto, to mention a few.[57]

The district court below, relying on the exhaustive historical research of Professor Robert L. Cord in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (Defendant-Intervenors' Exhibit 14), and the testimony and studies of Appellants' expert, Professor James McClellan (T. 519-606 and Defendant-Intervenors' Exhibits 12 and 13), reached the same conclusion as the *Donnelly* court:

> The First Amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791. . . . The drafters of the First Amendment understood the First Amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the First Amendment.[58]

As Anson Stokes in his more exhaustive three volume work, CHURCH & STATE IN THE UNITED STATES, and Appellants' expert witness James McClellan in his essay, *The Making and the Unmaking of the Establishment Clause*, suggest that to the drafters of the first amendment, there were seven criteria of when a church was historically established in one of the early states: (1) salaries of the ministers of that church were paid from tax money; (2) the buildings of the established church were maintained with tax funds; (3) school teachers of

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[57] *See also* Justice Rehnquist, dissenting, in *Thomas v. Rev. Bd.* 450 U.S. 707, 721-22 (1981) and in *Stone v. Graham*, 449 U.S. 39, 45-46 (1980); Justice Stewart, dissenting, in *Abington School Dist. v. Schempp*, 374 U.S. 203, 309-310 and *Engel v. Vitale*, 370 U.S. at 445; and Justice Reed, dissenting, in *McCollum v. Bd. of Educ.*, 333 U.S. at 245-46, where he refers to Jefferson's accommodation of religious sects at the University of Virginia.

[58] *Jaffree v. Bd. of School Comm'rs.*, 554 F. Supp. at 1115 (JS 21d-22d). (T. 529-30).

the established church were paid with tax money; (4) only clergy from the established church were permitted to marry and bury; (5) a penalty was levied for not attending the services of the established church; (6) only members of the established church could preach; and (7) office holding was limited to members of the established church.[59]

Five of the thirteen states had continued their religious establishments when the Constitutional Convention met in Philadelphia in 1787: Connecticut, Massachusetts and New Hampshire supported the Congregational Church, and Georgia and South Carolina the Anglican Church.[60] These states jealously guarded their religious practices and control over their public schools. They were not about to give up their authority to the federal government.[61]

During the debates over ratification of the Constitution, five states without established churches proposed amendments to the First Congress to prohibit the federal government from establishing a national sect.[62]. One

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[59] 1 A. STOKES, CHURCH & STATE IN THE UNITED STATES 358-446 (1950); McClellan, *Establishment Clause*, *supra* note 12, at 300-08. *See also Larson v. Valente*, 456 U.S. 228, 244, n. 19 (1982) for Massachusetts' experience.

[60] R. CORD, *supra* note 12, at 4.

[61] The tension between these five states and the five states which petitioned the First Congress for an amendment *preventing* establishment of a national religion will become apparent in the debates on the establishment clause, discussed *infra* in subsection 1. The vote of three-fourths or ten of the thirteen states required by article V of the United States Constitution for the adoption of an amendment would have been impossible to attain if the first amendment had been intended to disestablish the state churches of these five states.

[62] Virginia and North Carolina proposed identical amendments dealing with religion: "[N]o particular religious *sect* or *society* ought to be favored or established by law in preference to others." 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (2d ed. 1836) (emphasis added) [hereinafter cited as ELLIOT'S DEBATES] (Virginia, emphasis added); 4 *id.* at 244 (North Carolina). The

state, New Hampshire, where the Congregational Church was established, proposed an amendment to prevent the federal government from passing *any* law respecting religion.[63]

James Madison on June 8, 1789, after reworking these amendments, submitted the following amendment to the First Congress for its consideration: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall *any national religion* be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." [64]

1. *Congressional Debates on the Establishment Clause.*

A week after Congress passed the Northwest Ordinance, encouraging the teaching of religion and morality in the schools of the Northwest Territory, it began debate on the establishment clause. The debate makes it quite clear that the establishment clause was intended only to prohibit establishment of a national church.

Professor Michael Malbin (22a) notes the importance of the article "an" prior to "establishment of religion" in the amendment's final version:

> Had the framers prohibited "*the* establishment of religion," which would have emphasized the ge-

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resolution of the Rhode Island Convention echoed Virginia's, 1 *id.* at 334.

The New York Convention demanded that "no religious *sect* or *society* . . . be favored or established by law in preference to others." 1 *id.* at 328 (emphasis added). Although Maryland's Convention offered no official demands for amendments, a proposed amendment read: "That there be no National Religion established by law; but that all persons be equally entitled to protection in their religious liberty." 2 *id.* at 553. *See* CORD *supra* note 12, at 6, 11. (T. 524)

[63] New Hampshire's ratifying convention proposed that "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ELLIOT'S DEBATES, *supra* note 62, at 326.

[64] 1 ANNALS OF CONG. 434-35 (J. Gales ed. 1789) (emphasis added). (7a)

> neric word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing *"an establishment"* over "the establishment," they were showing that they wanted to *prohibit only those official activities that tended to promote the interests of one or another particular sect.*
>
> Thus, through the choice of "an" over "the," conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the *Northwest Ordinance* of 1787, which Congress reenacted in 1789. . . .[65]

As will be seen in the following summary of the debates, several representatives feared that the clause "no religion shall be established by law" (as proposed by the select committee on July 28, 1789) might be interpreted as hostile toward all religion. (8a) The response of James Madison and other members of the House assured these individuals that the sole purpose of the amendment was to prevent establishment of a national religion which would interfere with the state religious establishments. (Madison altered his views a decade later.)

Peter Sylvester, a lawyer from New York, opened the debate by indicating his displeasure with the select committee's version because he feared the words could be construed "to have a tendency to *abolish religion altogether.*"[66] (11a) New York's proposed amendment pro-

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[65] M. MALBIN, RELIGION AND POLITICS, THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 14-15 (1978) (emphasis added), cited by R. CORD, *supra* note 12, at 11-12. Malbin's chapter *The Establishment Clause* is included in full in the Appendix to this brief commencing at 1a.

[66] 1 ANNALS OF CONG. 729 (J. Gales ed. 1789) (emphasis added). *See also* ANTIEAU, DOWNEY, & ROBERTS, *supra* note 28, at 123-42. Professor Michael Malbin, *supra* note 65, at 7, suggests that Sylvester had two premises in mind as he spoke (11a):

> (1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church schools, such as those con-

vided only that "no religious *sect* or *society* . . . be favored or established by law in preference to others." [67]

Massachusetts' anti-Federalist leader, Elbridge Gerry, proposed that the amendment be reworded to read "no religious *doctrine* shall be established by law," which would have permitted such federal aid to religion in general as that of the Northwest Ordinance.[68] (12a) Massachusetts' constitution of 1789 provided that Protestant religious teachers in public schools could be paid from state tax funds to instruct in "piety, religion and morality." [69]

Roger Sherman, staunch Federalist from Connecticut, stated that he saw no need for an amendment, since the federal government had no authority to deal with religion.[70] (12a)

However, Federalist Daniel Carroll of Maryland favored the amendment because "many sects ha[d] concurred in opinion that they [were] not well secured under the present constitution." He believed that the amendment would "tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed." [71] (13a) His state's

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tained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival.

[67] 1 ELLIOT'S DEBATES, *supra* note 62, at 328 (emphasis added).

[68] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789) (emphasis added). As pointed out by Rep. Gerry later in the debate, the Federalists favored ratifying the Constitution as it was while the anti-Federalists wanted amendments before ratification. *Id.* at 731.

[69] MASS. CONST. of 1780, Pt. I, art. III (1780).

[70] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789). Connecticut also had established the Congregational Church.

[71] *Id.* Malbin believes these remarks were directed to the anti-Federalists.

constitutional proposal was almost identical to Madison's original draft.[72]

Madison responded that "he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience," for some states were of the opinion that Congress might "establish *a national* religion" and had therefore required the amendment.[73] (13a)

Benjamin Huntingdon of Connecticut, protecting his state's established church, agreed with Rep. Sylvester that the words "no religion shall be established by law" might be taken in such latitude as to be extremely hurtful to the cause of religion." (14a) In particular he feared that the federal courts would not enforce a state law which required that citizens pay taxes to support ministers and build meeting houses. Although he favored Rhode Island's prohibition of the establishment of a religion, he did not want the amendment to be worded in a way "to patronize those who professed no religion at all." [74]

Madison then suggested a return to the language of June 8th by adding the word "national" before "religion," for "the people feared one *sect* might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." [75] (14a) Madison's decade-later interpretation should be

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[72] 2 ELLIOT'S DEBATES, *supra* note 62, at 553.

[73] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789) (emphasis added). This sentence was quoted by Justice Reed, dissenting, in *McCollum v. Bd. of Educ.*, 333 U.S. 203, 244 (1948), to support his conclusion that "[t]he phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church." Justice Reed believed that Madison "by no means interpreted it to inhibit Congress from encouraging religion," according to F. O'Brien. F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 132 (1958).

[74] 1 ANNALS OF CONG. 730 (J. Gales ed. 1789).

[75] *Id.* (emphasis added).

reviewed in light of his contemporaneous statements about the establishment clause.

Samuel Livermore of New Hampshire, reflecting strong anti-Federalist sentiment, objected to the word "national," and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws *touching* religion, or infringing the rights of conscience."[76] By the word "touching" Livermore apparently intended to prohibit any federal interference with the established Congregational Church of his state. (15a)

After further opposition to the word "national" from staunch anti-Federalist Elbridge Gerry of Massachusetts, who had earlier proposed the words "religious doctrine" over "national religion," Madison withdrew his motion for insertion of the word "national" before "religion." He insisted, however, on making his point clear by observing that the words "no national religion shall be established by law" did not imply that the government was a national one.[77] Then Livermore's motion passed 31 to 20. (15a-17a)

The House was divided between the Federalists (who did not feel any amendments to the Constitution were necessary) and the anti-Federalists (who did not want any reference to a "national" government or religion in the clause and insisted on amendments to the Constitution before it was ratified).[78] The House was also split between the states that wanted to protect their established churches from the federal government and those that wanted to prevent the establishment of a national church. However, it is clear from the debates that Congressmen from states with established churches (Connecticut and Massachusetts) and those without (New York) agreed that a narrow meaning be given to the

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[76] *Id.* at 731 (emphasis added).

[77] *Id.*

[78] *See* remarks of Rep. Gerry, *id.*

establishment clause so that it would not prove to be hostile toward all religion, as this Court recently held in *Lynch v. Donnelly*, 104 S.Ct. at 1359.

After further debate the House adopted a slightly different version on August 21, 1789, restoring the words "establishing religion," which was then reported to the Senate.[79] (17a)

Although the Senate debates of September 3 and 9, 1789, were kept secret, five versions considered by that body prohibited Congress from making any law "establishing one religious *sect* or *society* in preference to others" (accepted and then amended), "establishing any religious sect or society" (defeated), "establishing any particular denomination of religion in preference to another" (defeated), "establishing religion" (accepted and then amended), and finally, as sent back to the House, "establishing *articles of faith* or a *mode of worship*."[80] (19a-20a)

The Senate's version was referred to a conference committee on which Madison and Sherman sat.[81] The compromise "Congress shall make no law respecting *an* establishment of religion, or prohibiting the free exercise thereof" was submitted to first the House, then the Senate, and subsequently approved, respectively, on September 24 and 25, 1789.[82]

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[79] 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES 107 (1789). "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*

[80] 1 JOURNAL OF THE FIRST SESSION OF THE SENATE 70, 77 (emphasis added) [hereinafter cited as SENATE J.].

[81] Also, on September 7, 1789, the Senate defeated an amendment that would have prohibited the *states* from infringing on the rights of conscience. *Id.* at 72.

[82] 1 ANNALS OF CONG. 913 (J. Gales ed. 1789) and 1 SENATE J. 88 (1789) (emphasis added).

The Senate's approval of the words "one religious sect or society" and "articles of faith or a mode of worship" indicates that it did not intend that the federal government be prohibited from aiding all religion. (18a-20a) Instead, the phrase "*an* establishment of religion" in the final version indicates that Congress simply intended to prevent the establishment of a national religious sect or denomination, as confirmed by Madsion during the debates. This narrow reading of the establishment clause is confirmed by the debates of the state legislatures which subsequently ratified it and by Congress' contemporaneous passage of the Northwest Ordinance and the Prayer Day Resolution.

2. *State Ratification of the Establishment Clause.*

In 1785, Virginia had refused to permit state tax money to be used to support teachers of religion.[83] In 1787, its constitutional convention had ratified the federal Constitution with a proposed amendment guaranteeing "that no particular religious sect or society ought to be favored or established, by law, in preference to others." [84]

When the Bill of Rights was submitted to the Virginia legislature for ratification in the fall of 1789, many feared that the language did not adequately restrict the federal government. After adoption by the House of Delegates on November 30, 1789, the Senate postponed ratification until December 15, 1791. A statement signed by six members of the majority in the Senate may explain the two-year delay:

> The [First] Amendment, recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and *although it goes to restrain Congress from passing laws establishing any national religion*, they might, notwithstanding *levy taxes to any amount, for the support of religion or*

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[83] *See Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947).

[84] 3 ELLIOTT'S DEBATES, *supra* note 62, at 659.

> *its preachers*; and any particular denomination of Christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in process of time render it as powerful and dangerous as it was established as the national religion of the country.[85]

The Senators apparently feared that the federal Congress would advance all religion or appropriate tax money for the benefit of all denominations, as had been proposed and rejected in Virginia's schools in 1785. The First Congress' re-enactment of the Northwest Ordinance shows that their fears were well grounded, for this act granted federal land for religious purposes and to schools that teach religion and morality.

The fact that none of the other states objected to the wording of the establishment clause or to the First Congress' passage of the Northwest Ordinance indicates that Virginia was clearly in a minority in its views, something which this Court has often overlooked.[86]

In fact, the citizens of North Carolina apparently approved of the practice. Reverend Nicholas Collins, in an article published during the debates in the North Caroline legislature, noted how a multiplicity of sects would prevent an establishment and advocated that every state and the federal government in the territories should provide a system of education "with sensible teachers, who shall instruct their pupils in the capital principles of religion, which are generally received, such as the being and attributes of God, his rewards and judgments, a future state, etc."[87] The Northwest Ordinance, whose

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[85] JOURNAL OF THE VIRGINIA SENATE 51 (1789) (emphasis added).

[86] For an exhaustive study of the state legislative debates on the establishment clause, *see* ANTIEAU, DOWNEY & ROBERTS, *supra* note 28, at 143-58.

[87] Fayettville Gazette, Sept. 14, 21; October 12, 1789. This article was also widely circulated in an influential magazine, 5 THE AMERICAN MUSEUM 303 (October 1789), after being published in the New York newspapers in June 1789. ANTIEAU,

history and impact were discussed earlier, fulfilled Collins' desires for inclusion of religion in the curriculum in schools under federal control.

C. The Establishment Clause Forbids the "Hostility" and "Callous Indifference" toward Religion that Would Be Shown by Barring a Moment for Individual Silent Prayer or Meditation, and Instead Allows the "Accommodation" and "Benevolent Neutrality" toward Religion that Is Shown by Sustaining a Moment of Silence.

The Alabama statute accommodates the free exercise of the religious beliefs and free exercise of speech and belief of those affected, permitting the government to assume the role of benevolent neutrality. This protection of the right of teachers to call for a moment of silence for permissive prayer or meditation is not an establishment of a national church.

This Court recently held in *Lynch*:

> [The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 314, 315, 72 S.Ct. 679, 684, 96 L. Ed. 954 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211, 68 S.Ct. 461, 465, 92 L. Ed. 649 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. *Zorach*, *supra*, 343 U.S. at, 314, 72 S.Ct. at 684. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum*, *supra*, 333 U.S., at 211-212, 68 S.Ct., at 465.

DOWNEY, & ROBERTS, *supra* note 28, at 157 add: "[w]hen this statement is considered in relation to the events in the first convention, it is apparent the citizens of North Carolina did not intend to embody a revolutionary principle in the First Amendment which would strip the federal government of power to recognize the need of her religious citizens."

Lynch v. Donnelly, 104 S.Ct. at 1359. "To hold that [the government] may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." [88]

Judge Roney, dissenting with three other judges from the denial of the Petition for Rehearing in this case by the Eleventh Circuit, agreed with First Circuit Chief Judge Coffin and District Judges Murray and Skinner in *Gaines v. Anderson*, 421 F. Supp. 337, 343 (D. Mass. 1976), that a statute which requires a period of silence for prayer or meditation "accommodate[s] students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters." [89] (JS 3b)

This Court held in *Marsh* that "to invoke Divine guidance on a public body . . . is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 103 S.Ct. at 3336.[90]

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[88] *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

[89] The court cites a number of the nation's leading constitutional scholars who believe that moments of silence may be permissible: L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 829 (1978); P. FREUND, RELIGION AND THE PUBLIC SCHOOLS: THE LEGAL ISSUE 23 (1965); Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 371 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1041 (1963). The *Gaines* case was relied on by the court in *Jaffree v. Wallace*, 713 F.2d at 614. (JS 3b) Justice Brennan, concurring in *Abington School Dist. v. Schempp*, 374 U.S. 203, 281 & n. 57 (1963), suggested that "the observance of a moment of reverent silence at the opening of class" would likely meet the test of constitutionality. *See also Reed v. Van Hoven*, 237 F. Supp. 48, 56 (D. Mich. 1965).

[90] *See also Mueller v. Allen*, 103 S.Ct. 3062 (1983) (tuition tax credits); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (exemption of religious school employees from

Certainly in light of the contemporaneous acts of Congress with respect to public schools examined in the previous sections, the Founding Fathers would draw no distinction between a state legislature's verbal prayers (held constitutional in *Marsh*) and a school child's silent prayers or meditation. Neither would be considered the establishment of a national church or of religion in any form.

As Justice Brennan has noted, "even when the government is not compelled to do so by the free exercise clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion." *Marsh v. Chambers*, 103 S.Ct. at 3346. *Accord*, *Walz v. Tax Comm'n*, 397 U.S. at 673.

However, the notion of accommodation does not require leveling of all religious beliefs. The founders of America intended that believers in God from different denominations be accommodated by the federal government vis-a-vis one another, not that the government be required to give non-believers equal treatment with believers.[91] This Court has omitted an important part of

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unemployment taxes); *Gillette v. United States*, 401 U.S. 437 (1971) (exemptions from compulsory military service for religious objectors); *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970) (property tax exemptions for religious organizations); *Arlans Dep't Store, Inc. v. Ky.*, 371 U.S. 218 (1962) (dismissing for want of a substantial federal question an appeal challenging the constitutionality of exemptions from Sunday closing laws for the benefit of Sabbatarians); *McGowan v. Md.*, 366 U.S. 420 (Sunday closing laws); *Zorach v. Clauson*, 343 U.S. 306 (off-premises public school release time programs); and *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education). *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down prohibition on religious group meetings on public university campus); *McDaniel v. Paty*, 435 U.S. 618 (1978) (striking down prohibition on service by ministers as delegates to state constitutional convention).

[91] James Madison and the Virginia constitutional ratifying convention defined religion as "the duty we owe to our Creator, and the manner of discharging it." 3 ELLIOTT'S DEBATES *supra* note 62, at 659. *See also* article 16 of the Virginia Bill of Rights, June

Justice Story's statement when it quotes him in *Lynch v. Donnelly*, 104 S.Ct. at 1361:

> The real object of the amendment was *not to countenance, much less to advance, Mahometanism [sic], or Judaism, or infidelity by prostrating Christianity; but to exclude all rivalry among Christian sects, and* to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. . . .[92] (T. 530)

Justice Story explained the public attitude that gave rise to the first amendment as follows:

> Probably at the time of the adoption of the Constitution, and of the [first] amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to *receive encouragement from the state* so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to *level all religions*, and to make it a matter of state policy to hold all in *utter indifference*, would have created *universal disapprobation*, if not *universal indignation*. . . .[93]

In view of the language, intent, and history of the establishment clause and contemporaneous acts of the First Congress and subsequent Congresses, Appellants Smith petition this Court to find that a moment for individual silent prayer or meditation was constitutional in schools supported by federal aid during the early congressional period and is now constitutional in public schools.

12, 1776, *reprinted in* C. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 62 (1900).

[92] 3 STORY'S COMMENTARIES, *supra* note 56, § 1871, at 728 (portions omitted from *Lynch* are underlined).

[93] 3 STORY'S COMMENTARIES, *supra* note 56, § 1868, at 726 (emphasis added).

D. The Establishment Clause Was Never Applied to the States, Other than by Judicial Error, as Demonstrated by the Language, Intent, and History of the Fourteenth Amendment.

The establishment clause did not apply to the states initially, as the language of the clause ("Congress . . ."), early Supreme Court decisions, and historical practice indicate. *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845). Five states had established churches when the first amendment was drafted in 1789, and these states made certain that the establishment clause was never applied to the states (amendments to the Constitution required a three-fourths majority of the states).

The fourteenth amendment did not apply the establishment clause to the states as the clear record of the congressional and state debates shows. Professor Raoul Berger of Harvard Law School, on whom the U.S. district court judge relied, reached this conclusion in his scholarly study entitled GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT:

> The historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody. . . .[94]

Berger's conclusion was the result of 431 pages of detailed discussion with many hundreds of footnotes. The court below also relied on a scholarly article by Professor Charles Fairman, then of Stanford Law School, entitled: *Does the Fourteenth Amendment Incorporate the Bill of Rights?*[95] The same conclusion has been

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[94] R. BERGER *supra* note 12 at 407, cited in *Jaffree v. Bd. of School Comm'rs.*, 554 F. Supp. at 1120-22 (JS 31d-35d).

[95] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949), cited in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1119 (JS 29d). *See also* H. MEYER,

reached by numerous other scholars.[96]

In their Jurisdictional Statement, Appellants Smith set forth at pages 11-21 reasons why the establishment clause did not apply to the states. These reasons are summarized as follows: (1) The purpose of the fourteenth amendment was to limit the power of the states only when they failed to provide due process of law or equal protection of the law to their citizens. (2) The debates of the 39th Congress on the version of the fourteenth amendment finally adopted and the debates of the state legislatures which ratified it do not contain a single reference to the establishment clause or the establishment of religion.[97] (3) State and federal Supreme Court decisions rendered immediately after the adoption of the fourteenth amendment show conclusively that no court believed that either the establishment clause or other portions of the first eight amendments were applicable to the states. (4) The reliance of Justice Black in his dissent in *Adamson v. California*, 332 U.S. 46, 115 (1947) on the remark of Rep. Bingham in 1871, five years after the congressional debates, that the first eight amendments did apply to the states has been seriously challenged by Professor

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THE HISTORY AND MAKING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT (1977), excerpts from which were introduced into evidence as Defendant-Intervenors' Exhibit 15.

[96] An impressive number of scholars have also written in support of the Fairman view and in opposition to Justice Black's extension of the establishment clause to the states. *E.g.*, M. HOWE, THE GARDEN AND THE WILDERNESS 22-33 (1965); W. KATZ, RELIGION AND THE AMERICAN CONSTITUTIONS (1964); Katz, *The Case for Religious Liberty*, in J. COGLEY, RELIGION IN AMERICA 101 (1958); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L. Q. 371; and J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 10 (1949). *But see*, Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

[97] Professor James McClellan, constitutional expert for appellants, testified that the issue of application of the establishment clause to the states "was not even debated when the fourteenth amendment was prepared and drafted [by] Congress." (T. 544-45)

Bernard Schwartz in his STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS. Schwartz notes that Bingham's 1871 speech was not adopted by Congress, but was a proposal to it for future actions to be taken.[98] (5) Congressional debates on the Blaine Amendment show that Representatives and Senators who participated in the debates on the fourteenth amendment just seven years earlier did not believe that the establishment clause was applied to the states. (T. 546-47)[99]

This Court's decision that silent individual prayer and meditation is constitutional may rest on either a careful reading of establishment clause history or on re-examination of application of this clause to the states through the fourteenth amendment. Appellants Smith urge this Court to re-evaluate the language, intent, and contemporaneous history of both the the first and fourteenth amendments in order to redress the grievous interference with their free exercise of religion in this case. Much of this interference has been brought about by this Court's thrusting itself into the role of sole arbiter of state establishment disputes which the drafters of these amendments intended to be left to the states to decide under their own constitutions and religious convictions. Should this Court find that recent but erroneous reliance on precedents violates the meaning, intent, and history of the first and fourteenth amendments, then the Court should find, as Justice Holmes did, that the error is "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-33 (1928), quoted

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[98] B. SCHWARTZ, I STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 294, 306-07 (1970): "Never in the 1866 debates did Bingham refer specifically to the now claimed incorporation of the Bill of Rights in the new amendment. . . ."

[99] *See* Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).

in *Erie v. Tompkins*, 304 U.S. 64, 79 (1938) (per Brandeis, J.).[100]

CONCLUSION

Considerable evidence was presented to the trial court in an adversarial context in this case which was not available to the Supreme Court when it passed upon the meaning of the establishment clause and its applicability to the states in *Everson*, *Engel*, and *Abington*:

(1) Testimony and research showing how rivalry between the former colonies and fear of a national religious establishment caused the First Congress to prohibit the federal government from promoting a single religious sect or denomination while not intending thereby to show hostility toward religion. "The real object to the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." [101]

(2) An extensive study of federal financial projects such as the Northwest Ordinance which advanced religion in public education during the early constitutional period—projects which were approved by both Jefferson and Madison.[102] "[N]ondiscriminatory or indirect aid to religion or to religious institutions was [not] to come under the ban of the First Amendment . . . ," according to the exhaustive research of Professor Cord.[103]

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[100] This Court in *Erie* relied on "recent historical research by a competent scholar" in overruling almost 100 years of judicial assumption of power. *Erie v. Tompkins*, 304 U.S. 64, 72-73 (1938).

[101] *Lynch v. Donnelly*, 104 S.Ct. at 1361. *Accord* T. 530-32. The expert testimony of Professor James McClellan was expanded on by his article, *The Making and the Unmaking of the Establishment Clause*, *supra* note 12. *See also* R. CORD, *supra* note 12, at 3-15 with M. MALBIN, *supra* note 65, at 1-17 (1a-27a), quoted extensively by Cord.

[102] R. CORD, *supra* note 12 (Defendant-Intervenors' Exhibit 14, copies of which have been lodged with the Office of the Clerk for the convenience of this Court and excerpts from which are contained in the Appendix at 1b.)

[103] R. CORD, *supra* note 12, at 50.

(3) Extensive evidence on the erroneous application of the establishment clause to the states through the fourteenth amendment.[104]

If the First Congress which passed the first amendment could set aside federal lands for public schools to teach religion and morality and then mandate a national day of prayer which was apparently to be observed by adults and school children alike, then the lesser activity of observing a moment of silence for individual prayer or meditation is certainly constitutional. This conclusion is inescapable under the historic view as an accommodation of religion and speech.

As this Court states in *Lynch v. Donnelly*, 104 S.Ct. at 1359, "[This Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Holding a period of silence for individual prayer or meditation constitutional is consistent with prior holdings of this Court which permitted beneficial aid to religion.[105]

Prior decisions of lower courts which have sought to apply this Court's decisions have had a chilling effect on the prayers of students and teachers.[106] Although perhaps unintended by this Court or lower courts, such rulings

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[104] *See* R. BERGER, *supra* note 12, cited with approval by the court below, *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1122; and H. MEYER, *supra* note 95. *See also* Jurisdictional Statement of Appellants Smith at pages 11-21.

[105] *See* cases cited in *Lynch*, 104 S.Ct. at 1363.

[106] *Stein v. Oshinsky*, 348 F.2d 999, 1002 (1965) required parents of kindergarten children to "content themselves with having their children say [their] prayers before nine or after three." The court below held that the establishment clause prohibited "any government involvement with religion" (JS 8a) and that "the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation," (JS 18a) *Jaffree v. Wallace*, 705 F.2d at 1531, 1536.

seem to interfere with the authority of God over prayer.[107]

The 624 teachers, parents and students who are Appellants Smith petition this honorable Court (1) to examine the historical evidence presented for the first time to the trial court below by the adversarial system, (2) to restore the original intent of the establishment clause by permitting the observance of a moment of silence for meditation or permissible prayer, and (3) to return such matters of state law to the state courts to decide under their own constitutions, thus affirming the conclusions of the trial court below.

Respectfully submitted,

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[107] Justice Douglas, dissenting in *McGowan v. Maryland*, 366 U.S. 420, 562 (1961), acknowledged this higher authority, citing the Declaration of Independence:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

James Madison expressed the same sentiment before the Virginia Constitutional Ratifying Convention on June 12, 1788: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation." S. PADOVER, THE COMPLETE MADSION 306 (1953).